

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1833

Cir. Ct. No. 1997CF1087

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Robert Taylor appeals from the order of the circuit court that denied his motion for a new trial based on newly discovered evidence. Because we conclude that the circuit court properly denied the motion, we affirm.

¶2 In 1998, Taylor was convicted after a jury trial of armed robbery, and the court sentenced him to fifty years in prison. This court affirmed the conviction on appeal. *State v. Taylor*, Appeal No. 2000AP486-CR, unpublished slip op. (Ct. App. Feb. 14, 2001). Taylor then brought an unsuccessful motion for postconviction relief, which this court also affirmed. *State v. Taylor*, Appeal No. 2002AP1723, unpublished slip op. (Ct. App. April 9, 2003). He then brought a motion for a new trial. This motion was based on the offer of recantation testimony by one of his co-actors who had testified against him at his trial. The circuit court denied the motion without a hearing. On appeal, we summarily reversed and remanded to the circuit court for a hearing on the motion. *State v. Taylor*, Appeal No. 2004AP600, unpublished order (Ct. App. Dec. 15, 2004). This appeal is from the order of the circuit court that denied the motion after a hearing on remand.

¶3 There is a five-part test to determine whether newly discovered evidence warrants a new trial: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *State v. Coogan*, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. *State v. Kaster*, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). A motion for a new trial is addressed to the sound discretion of the trial court and we will not reverse the trial court decision unless it erroneously exercised its discretion. *Id.*

¶4 Taylor based his motion on the testimony of John Brinker, who was an accomplice in the armed robbery, and had testified against Taylor at his trial. In his recantation, Brinker stated that the State wanted him to testify that Taylor had been involved in the robbery, even though he and another man were the ones who actually committed the crime. Brinker also said that the State offered to reduce his sentence to ten years in exchange for his testimony. Brinker was ultimately sentenced to ten years.

¶5 The circuit court found that Brinker's testimony was incredible. The court found that Brinker was a man of limited intelligence who had been manipulated by Taylor in the past. The court further noted that Brinker testified that he did know the meaning of all the words in the affidavit he had signed, and that the affidavit had been typed by Taylor himself. The court noted that this had been done while the two were in prison together, and therefore, had not been done "in an atmosphere of freedom and safety."

¶6 The court further found that on cross-examination, Brinker testified that he had been sentenced before Taylor's trial, rather than after. Additionally, there was nothing in the record to corroborate that the State gave Brinker any consideration whatsoever for his trial testimony implicating Taylor. The court stated that Brinker's trial testimony, while important, was not the only evidence against Taylor. The court also noted that Brinker was "less-clear minded" and was "perhaps suffering from the effects of aging, but doesn't have a clear memory of many of the things that he has testified about in the past and what he now recalls." The court concluded that there was not sufficient corroboration to support Brinker's recantation, and that there was no reasonable probability that a jury, comparing the current statement with Brinker's trial testimony, would reach a different result.

¶7 We agree with the circuit court's findings that Brinker's testimony was incredible, and that, even if it were true, there was no corroboration. Based on these findings, we agree with the circuit court's conclusion that there is no reasonable probability that the jury would reach a different result. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

